(2)

No. 89-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEIST PUBLICATIONS, INC.,
Petitioner,
v.
RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION OF NORTH AMERICAN DIRECTORY PUBLISHERS AND THE DIRECTORY PUBLISHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FEIST PUBLICATIONS, INC.

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Association of North American Directory Publishers and the Directory Publishers Association ("the Associations") hereby respectfully move for leave to file the attached brief as *amici curiae* in this case. The consent of the attorney for the Petitioner, Feist Publications, Inc. ("Feist"), has been obtained.* The consent of the attorney for the Respondent, Rural Telephone Service Company, Inc. ("Rural Telephone"), was requested but refused.

The interests of the Associations in this case arise from the fact that local telephone companies, like Rural Telephone, are the only practical source of name, address, and telephone number fact information for the Associations' members, who publish and distribute independent telephone directories throughout the country. The Tenth Circuit's holding here adopts a controversial minority view, previously shared by the Seventh and Eighth Circuits, of the correct scope of copyright protection in fact compila-

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* The written consent of Petitioner is being filed with the Clerk of the Court contemporaneously herewith.

tions such as telephone directories. That standard, commonly known as the "sweat of the brow" doctrine, conflicts with the approach taken by other circuits, including the Second, Fourth, Fifth, Ninth, and Eleventh, which adhere more closely to the plain language of the Copyright Act in analyzing the scope of copyright protection. Because the Associations' members must order their business practices to comply with the copyright laws, they are vitally interested in a resolution by this Court of the correct approach to copyright in fact compilations such as telephone directories.

Petitioner, Feist, has argued a number of issues supporting grant of *certiorari* in this case and only briefly discussed the split of authority among the circuits. The brief that the Associations are requesting permission to file as *amici curiae* focuses exclusively on this issue and contains a more complete argument of the correct scope of copyright protection in compilations. If this argument were accepted, it would be dispositive of this case.

Respectfully submitted,

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QUESTION PRESENTED

The Associations fully support each of the arguments made by Feist in its Petition and incorporate those arguments as if fully set forth herein. In the interest of brevity, this brief focuses on the issue that is of overriding significance to the independent telephone directory publication industry, namely:

Whether a copyright on a compilation of preexisting factual data published in the form of a directory is a proper basis for the copyright owner to claim a property right in the data, so as to preclude the use of the data by others, in light of the statutory admonition that "[t]he copyright in a compilation . . . does not imply any exclusive right in the preexisting material," 17 U.S.C. § 103(b), and the fact that "[c]opyright does not preclude others from using the ideas or information revealed by the author's work." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5670.

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BRIEF OF THE ASSOCIATION OF NORTH AMERICAN DIRECTORY PUBLISHERS AND THE DIRECTORY PUBLISHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER FEIST PUBLICATIONS, INC.

PRELIMINARY STATEMENT

The Association of North American Directory Publishers and the Directory Publishers Association ("the Associations") submit this brief as *amici curiae*, pursuant to Rule 36.1 of the Rules of this Court, in support of Petitioner, Feist Publications, Inc. ("Feist").

INTEREST OF THE ASSOCIATIONS AS *AMICI CURIAE*

The Associations are international trade associations comprised of over 100 publishers of telephone directories. The Associations' members publish "independent" telephone directories, *i.e.*, directories other than those pub-

lished by or for local telephone companies. The Associations have extensive industry knowledge that is the product of the collective experience of their members in the United States and abroad.

The issues involved in this case transcend the interests of the parties and are of particular importance for the proper administration of the law of copyright and, therefore, to the Associations and their members. The opinion below adopts as the law of the Tenth Circuit, in lieu of the constitutional and statutory requirement of authorship, a controversial minority view of the correct scope of copyright protection in fact compilations such as telephone directories, commonly known as the "sweat of the brow" doctrine. The application of this doctrine goes far towards granting the telephone companies with which the Associations' members compete an exclusive property right in the names, addresses, and telephone numbers of their subscribers. The "sweat of the brow" doctrine predates and contradicts the plain language of the 1976 Copyright Act, which specifically grants copyright protection only to an "original work of authorship." 17 U.S.C. § 102(a). While a telephone directory as a whole is a copyrightable work of authorship by reason of Section 103(b) of the Act, that same section excludes from copyright protection that portion of the compilation comprising such preexisting facts as names, addresses, and telephone numbers. 17 U.S.C. § 103(b).

The holding below demonstrates the uncontrolled and illogical expansion of copyright protection that has occurred in those circuits that have adopted a "sweat of the brow" analysis in cases involving copyrights in fact compilations. If allowed to stand, the decision will suggest to local monopoly telephone companies that they may control the dissemination and uses of a substantial body of basic, uncopyrightable fact information to the exclusion of the Associations' members and all others.

In light of the fundamental differences among the circuits in their approach to copyright in compilations such as telephone directories, the Associations' members are significantly handicapped in conducting their business operations in those jurisdictions that have adopted the minority "sweat of the brow" doctrine.

STATEMENT OF THE CASE

Respondent, Rural Telephone Service Company, Inc. ("Rural Telephone"), is a telephone company granted monopoly status to provide telephone service to subscribers in certain areas of Kansas. Like most telephone companies, Rural Telephone is required by regulation annually to publish a telephone directory for the area in which it provides telephone service.[1] As is typical of telephone directories, Rural Telephone's directory includes an alphabetical list of the names, addresses, and telephone numbers of the company's telephone subscribers printed on white paper (the "white pages") and a separate list of business subscribers and classified advertisements, organized by descriptive business classifications, printed on yellow paper (the "yellow pages").

Petitioner, Feist, is an independent publisher of telephone directories that also contain white pages (alphabetical) listings of telephone subscribers and yellow pages (classified) listings and advertising. One of Feist's directories covers an area that includes the service area of Rural Telephone. Feist competes with Rural Telephone and others for yellow pages advertisers in the areas covered by its directories.

Feist used the Rural Telephone directory as a source of name, address, and telephone number fact information concerning businesses and residences in Rural Telephone's

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[1] Directive of the State Corporation Commission of Kansas (May 1, 1967).

public utility service area. After independently verifying this preexisting fact information where possible, Feist used the information to publish the white pages portion of its competitive telephone directory.

Rural Telephone filed suit against Feist, alleging that Feist's use of the preexisting name, address, and telephone number fact information appearing in the Rural Telephone directory infringed the copyright claimed therein. Feist denied Rural Telephone's copyright infringement allegations and raised various antitrust defenses and counterclaims.

The district court severed the copyright and antitrust issues and granted summary judgment in favor of Rural Telephone on its copyright infringement claims. *Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc.*, 663 F. Supp. 214, 220 (D. Kan. 1987) (*"Feist Publications"*) (Pet. 15a). The court held, without analysis, that "the white pages of a telephone directory constitute original work of authorship and are, therefore, copyrightable under either the provisions of 17 U.S.C. § 102 or § 103." *Id.* at 218 (Pet. 10a). The district court concluded that the copyright in the directory was infringed by Feist's mere taking of fact information from Rural Telephone's directory. *Id.* at 218-19 (Pet. 10a-11a). The court also rejected Feist's "fair use" defense.

Adopting the "sweat of the brow" doctrine as enunciated in *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937) (*"Leon"*),[2] *Feist Publications*, 663 F. Supp. at 218 (other citations omitted) (Pet. 9a), the court ruled that an existing copyrighted compilation may only be used by a subsequent compiler to verify the results of that subsequent compiler's own independent canvass of

[2] The *Leon* court's notion that "labor is protectible" under the copyright laws was subsequently rejected by the Ninth Circuit. *See Worth v. Selchow & Righter Co.*, 827 F.2d 569, 572-74 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

telephone subscribers. *Id.* at 219 (citing *Central Tel. Co. v. Johnson Publishing Co.*, 526 F. Supp. 838, 843 (D. Colo. 1981)) (Pet. 13a-14a). As Feist had not first conducted an independent canvass here, the court found that Feist had infringed Rural Telephone's copyright in the directory, "even though [Feist] later verified the material" it had obtained from Rural Telephone's directory. *Id.* at 219 (Pet. 14a).[3]

The Tenth Circuit, in an unpublished opinion, affirmed the district court's decision for "substantially the reasons given by the district court" (Pet. 4a).

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF THE PROPER SCOPE OF COPYRIGHT PROTECTION FOR COMPILATIONS OF PREEXISTING FACTS

As stated in Feist's Petition, there is currently a serious division among the circuits between the minority[4] that adheres to the "sweat of the brow" doctrine to determine the scope of copyright protection in a compilation and the majority[5] that adheres to the more modern and

[3] The district court subsequently found Rural Telephone liable for antitrust violations. *Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc.*, [1990-1 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 69,022 (Apr. 5, 1990).

[4] The decisions below adopt the "sweat of the brow" test that has been applied by the Seventh and Eighth Circuits. *See Rockford Map Publishers, Inc. v. Directory Serv. Co.*, 768 F.2d 145 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985) (*"Hutchinson"*).

[5] The Second, Fourth, Fifth, Ninth, and Eleventh Circuits do not follow the "sweat of the brow" standard, recognizing that, if copyright protection is based upon the first author's labor in fact gathering, it will inevitably allow a monopoly over the facts themselves. *See Konor Enters., Inc. v. Eagle Publications, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 809-10 (11th Cir.

constitutionally consistent analysis required by the 1976 Copyright Act. In the instant case, the Tenth Circuit has allied itself with the "sweat of the brow" minority, which extends copyright protection indiscriminately to all and any part of a work that is the product of "industrious collection" and finds infringement in the absence of particular expenditures of labor by the alleged infringer. *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922) (*"Jeweler's Circular"*). *See also Hutchinson*, 770 F.2d at 131-32; *Leon*, 91 F.2d at 485-86. This approach conflicts with (1) the constitutional limitation of copyright to the "writings" of "authors"[6] and (2) the statutory mandate of Section 103(b) of the 1976 Copyright Act, 17 U.S.C. § 103(b), that copyright in a compilation[7] extends only to the original authorship contributed by the compiler and expressly does not extend to the preexisting facts or data used in the compilation:

1985) (*"ATD"*); *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 491 (9th Cir. 1985); *Financial Information, Inc. v. Moody's Investors Serv., Inc.*, 751 F.2d 501, 506 (2d Cir. 1984); *Eckes v. Card Prices Update*, 736 F.2d 859, 862-63 (2d Cir. 1984); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369-70 (5th Cir. 1981) (*"Miller"*). These decisions properly focus on the only element of a compilation of preexisting facts that is copyrightable; namely, the originality, if any, in its selection and arrangement of those preexisting facts.

[6] U.S. Const. art. 1, § 8, cl. 8 confers upon Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ." *See also Miller*, 650 F.2d at 1368 ("An 'author' is one 'to whom anything owes its origin; originator; maker; one who completes a work of science or literature' ") (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

[7] 17 U.S.C. § 101 defines a "compilation" as ". . . work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work *as a whole* constitutes an original work of authorship." (Emphasis added.)

> The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. § 103(b). The legislative history of this provision observes:

> Section 103(b) [17 U.S.C. § 103(b)] is also intended to define, more sharply and clearly than does section 7 of the present law [former 17 U.S.C. § 7], the important interrelationship and correlation between protection of preexisting material and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 57, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5670.

Thus, the 1976 Copyright Act extends copyright protection in a fact compilation only to the "material added" by the compiler, and excludes from the scope of that protection the preexisting facts employed by the compiler in producing the compilation. Definition of this limited grant of copyright protection as applied to any particular work necessarily requires the concise delineation of just what is within the scope of the copyright (*i.e.*, the original additions of the compiler) and what remains in the public domain notwithstanding its incorporation into a copyrighted compilation (*i.e.*, the preexisting facts).

II. THE SWEAT OF THE BROW DOCTRINE ADOPTED BY THE TENTH CIRCUIT IS INCONSISTENT WITH MODERN PRINCIPLES OF COPYRIGHT LAW

In application, the "sweat of the brow" doctrine adopted by the courts below omits crucial steps in the statutory copyright infringement analysis: In direct contravention of the Copyright Act, no effort is made (1) to separate the copyrightable authorship (if any) contributed by the compiler from the uncopyrightable preexisting facts and data employed in the compilation, and (2) to determine whether the alleged infringer has taken copyrightable authorship or uncopyrightable facts. Instead, the "sweat of the brow" doctrine simply presumes that the taking of any of the fruits of the compiler's *labor* (whether or not such labor is authorship) is infringement unless the alleged infringer went through an inefficient and generally pointless exercise to duplicate some portion of the first compiler's *labor*. As explained by the Eleventh Circuit:

> In the past, some courts had, in effect, protected public domain material against copying by requiring the second compiler of such material to do his own independent research and expend his own labor and effort . . . . Our inquiry here does not require that we choose between a limited or more expansive standard of originality under the Act . . . . Nonetheless, we are in agreement with the *Miller* panel and Nimmer that protection of original research of information in the public domain is better afforded under an unfair competition theory.

ATD, 756 F.2d at 810 n.9 (citing *Miller*, 650 F.2d at 1369; 1 M. & D. Nimmer, *The Law of Copyright* § 3.04 at 3-19 (1990) ("Nimmer")).

The "sweat of the brow" doctrine has its origins in Nineteenth Century notions of property rights, reflecting a belief that the industrious investment of labor, without

more, should give rise to a property right.[8] *See Jeweler's Circular*, 281 F. at 88; *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89, 92 (N.D. Ill. 1982) ("*National Business Lists*"); Nimmer § 3.04. The doctrine thus contravenes the 1976 Copyright Act in ignoring the requirement of authorship. In practical effect, it resurrects discredited notions of state unfair competition law by engrafting them onto the federal copyright law. *See, e.g., Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964) ("[j]ust as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws"); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (". . . when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article"). Thus understood, the "sweat of the brow" doctrine is doubly pernicious, since it not only violates the express preemption of Section 301 of the Copyright Act,[9] but also runs contrary to the federal policy established by the very statute it wrongly invokes. While considerations analogous to some elements of common law unfair competition may well have a place in the analysis of fair use, they have no place in the prerequisite determination of what

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[8] Nineteenth Century copyright cases protected the book as it was published. The 1976 Copyright Act protects only an "original work of authorship," of which the book is a copy. There is "a fundamental distinction between the 'original work' which is the product of 'authorship' and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a 'book" is not a work of authorship, but is a particular kind of 'copy.'" H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5664.

[9] 17 U.S.C. § 301. *See also Peckarsky v. American Broadcasting Co., Inc.*, 603 F. Supp. 688, 695 (D.D.C. 1984) (purpose of broad statutory preemption scheme in Copyright Act is to further Act's goal of encouraging contributions to recorded knowledge by precluding use of state law to prevent copying of material that Congress has determined should be left in public domain).

is copyrightable and whether something copyrightable has been taken.

The discussion of "verification" in the opinion below vividly highlights this point. The courts below concluded that the taking of basic factual information from the telephone company's directory infringed the copyright in the directory as a whole. That conclusion followed not from a finding that copyrightable authorship was taken but rather from a finding that the second compiler did not first attempt to duplicate some portion of the telephone company's database through an "independent canvass" before taking fact information from the telephone company directory.[10] There is no support whatsoever in the Copyright Act for the imposition of such a requirement. *See, e.g., Miller*, 650 F.2d at 1372 ("The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if *research* is held to be copyrightable") (emphasis added); Nimmer § 2.11[E] at 2-169 to 2-170 ("The discovery of a fact, regardless of the quantum of labor and expense, is simply not the work of an author").

The absence from the Copyright Act of any basis for the imposition of a requirement to duplicate a prior compiler's labor before taking preexisting fact information from a copyrighted compilation is reflected in the vague and inconsistent manner in which the "sweat of the brow" cases explain how much duplication of the prior compiler's labor will be required before resort to the copyrighted compilation is permitted. *Compare United Tel. Co. v. Johnson Publishing Co., Inc.*, 855 F.2d 604, 606 (8th Cir. 1988) (copyright infringement found where compiler obtained 5,000 names, addresses, and telephone numbers of residences and businesses from telephone directory and subsequently verified by telephone all but 214

[10] Feist did not copy the entirety of the Rural Telephone directory, but merely used some of the fact information appearing therein. *Feist Publications*, 663 F. Supp. at 217 (Pet. 7a).

of those listing before publishing them in compiler's own directory) with *Southwestern Bell Media, Inc. v. Trans Western Publishing, Inc.*, 685 F. Supp. 779, 780-81 (D. Kan. 1988) (no copyright infringement found where compiler obtained 40,000 business names, addresses, and telephone numbers from telephone directory and subsequently verified by telephone or other business contact all but 500 of those listings before publishing them in compiler's own directory). The district court's subsequent opinion on the antitrust counterclaims in the instant case observes:

> [T]he copyright laws do not totally preclude the independent telephone directory publisher from using the local telephone company directory. The copyright laws require only that the independent publisher make an honest, good faith effort at obtaining the information contained in the telephone company directory prior to using that directory . . . . The court cannot establish in this opinion what constitutes such an effort . . . .

Rural Tel. Serv. Co., Inc. v. Feist Publications, Inc., [1990-1 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 69,022 at 63,610-11 (Apr. 5, 1990). Such an amorphous standard, bereft of statutory underpinnings, is a treacherously vague basis for decisionmaking by the Associations' members and other businesses.

The practical effect of the "sweat of the brow" doctrine's requirement that a subsequent compiler perform a prior independent canvass is to confer upon the first compiler of fact information a virtual monopoly in the facts compiled. As the majority of the circuits and commentators have recognized, that result is irreconcilable with a constitutional and statutory scheme that extends copyright protection only to authorship and denies such protection to facts and ideas, no matter how industriously gathered.[11]

[11] It has always been a fundamental principle of the copyright laws, reflecting our societal needs to communicate and to balance the

III. TELEPHONE DIRECTORIES ARE AN APPROPRIATE CONTEXT IN WHICH TO ADDRESS BROAD QUESTIONS OF THE SCOPE OF COPYRIGHT IN FACT COMPILATIONS

Telephone directories are one of an increasing number of kinds of works that fit within the statutory definition of "compilation." The Copyright Act treats all such fact compilations alike. Telephone directories provide a particularly appropriate context for the Court to resolve the conflict among the circuits and establish a uniform doctrine of copyright for fact compilations because such directories are nearly universal in format, straightforward in content, and ubiquitous in dissemination throughout the country. Telephone directories are also the subject of much of the "sweat of the brow" jurisprudence, a fact which has resulted in telephone directories being given more extensive copyright protection in some circuits than other fact works despite the absence of any statutory basis for such disparate treatment. *Compare Illinois Bell Tel. Co. v. Haines and Co., Inc.*, 683 F. Supp. 1204, 1210 (N.D. Ill. 1988) (". . . the Seventh Circuit firmly holds that a compiler commits copyright infringement if he copies the original compiler's information without conducting an independent canvass" and uses such information in the publication of a telephone directory) with *Nash v. CBS, Inc.*, 899 F.2d

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First Amendment guarantee of freedom of speech with copyright protection, that "protection is given only to the expression" of an author's ideas or facts, not to the ideas or facts themselves. *Mazer v. Stein*, 347 U.S. 201, 217 (1954). *See also Baker v. Selden*, 101 U.S. 99, 102-03 (1880); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Miller*, 650 F.2d at 1368-69; Nimmer § 1.10[B][2] at 1-76 to 1-78.2, and § 2.11[A] at 2-157; Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. Rev. 719, 763 (1989) ("The originality requirement is *constitutionally mandated* for all works") (citing *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980)) (emphasis in original).

1537, 1542-43 (7th Cir. 1990) ("Copyright law does not protect hard work (divorced from expression) . . ." in an author's research of book; others may freely use his work ". . . as a source of facts and ideas").[12]

A clear and universally applicable doctrine of compilation copyright properly anchored to the 1976 Copyright Act will serve societal interests well beyond those associated with telephone directories. Computer-assisted compilations of fact information, of which telephone directories are an example, are increasing in number and importance to the flow of commerce and knowledge. The "sweat of the brow" doctrine frustrates and impedes the balancing of interests between the publishers of such compilations and the public's interest in free access to information established in the 1976 Copyright Act. For example, the Eighth Circuit's decision that the page numbers in the West regional reporters were protected by copyright and infringed by their inclusion in the LEXIS legal research service, *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1240 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987), was based on the "sweat of the brow" doctrine and has been the object of near-universal scholarly criticism because of the inconsistency between that decision and the 1976 Copyright Act. *See, e.g.*, W. Patry, *Latman's The Copyright Law* 63 n.212 (6th ed. 1986); Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protec-*

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[12] *See also Miller*, 650 F.2d at 1370; Patterson & Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. Rev. at 776 n.196. There is no policy basis for according greater copyright protection to telephone directories than to other fact compilations. The constitutional foundation of copyright law is to create incentives to authorship, and telephone companies require no such incentive since they are generally required to produce telephone directories by statute or regulation. Thus, insofar as the constitutional policy of copyright is concerned, telephone company directories merit less, rather than more, copyright protection than other fact compilations.

tion for Law Reports and Statutory Compilations, 36 U.C.L.A. L. Rev. 719 (1989). Authoritative guidance from the Court will enable compilers and users of computer-assisted databases and output therefrom in numerous industries and settings to proceed with greater confidence of their rights and obligations.

IV. THE OPINIONS OF THE COURTS BELOW ARE INCONSISTENT WITH THE COURT'S DECISION THIS TERM IN *STEWART v. ABEND*

The opinion of the Court in *Stewart v. Abend*, 495 U.S. ——, 110 S. Ct. 1750 (1990) handed down earlier this term, addresses an issue in copyright law conceptually analogous to the issue presented here, and reaches a conclusion consistent with that advocated by Petitioner and the Associations. *Stewart* concerns "derivative works," which receive copyright protection under the same provisions of the Act as compilations. In *Stewart*, the Court preserved the clear statutory distinction between a derivative work and the underlying material used in the derivative work, and limited the scope of the derivative work copyright to the new, original contribution of the derivative work author. *Id.* at 1761. That same statutory distinction exists with respect to compilations, and is ignored by the "sweat of the brow" doctrine, which indiscriminately sweeps within the scope of the compilation copyright not only original authorship (if any) of the compiler, but the constitutionally uncopyrightable preexisting fact information. Reversal of the decision below would bring the law of compilation copyright into harmony with the Copyright Act as recently interpreted by the Court in *Stewart*.

CONCLUSION

For the foregoing reasons, the Petition of Feist Publications, Inc., should be granted.

Respectfully submitted,

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